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NO. 89-7279

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1989 TERM

ROBERT LEE SHELL

PETITIONER

VERSUS

STATE OF MISSISSIPPI

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

MIKE MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI

CHARLENE R. PIERCE
SPECIAL ASSISTANT ATTORNEY GENERAL
(Counsel of Record)

ATTORNEYS FOR RESPONDENT

Office Of The Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

(9)

QUESTIONS PRESENTED

- I. WHERE A QUESTION CONCERNING THE ADMISSIBILITY OF PHOTOGRAPHS, NOW FRAMED IN FEDERAL CONSTITUTIONAL TERMS, WAS NOT SO PRESENTED TO THE COURT BELOW, THIS COURT HAS NO JURISDICTION TO CONSIDER THE CLAIM.
- II. THERE IS NO BASIS ON WHICH TO REMAND THIS CASE FOR RECONSIDERATION IN LIGHT OF McKOY v. NORTH CAROLINA.
- III. THERE IS NO BASIS ON WHICH TO REMAND THIS CASE FOR RECONSIDERATION IN LIGHT OF CLEMONS v. MISSISSIPPI.

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BRIEF IN OPPOSITION

Respondent, State of Mississippi, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi be denied in this case.

OPINION BELOW

The opinion of the Mississippi Supreme Court is reported as Shell v. State, 554 So.2d 887 (Miss.1989). A copy of this opinion is before this Court as an appendix to the petition for certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C.A. Section 1257(3). He fails to do so.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Petitioner seeks to invoke the provisions of the Constitution of the United States, Amendment V, VI, VIII, and XIV.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Petitioner was indicted for capital murder while engaged in the commission of the crime of armed robbery. The indictment was returned by the grand jury of the Circuit Court of Winston County, Mississippi during the October 1986 Term of that court. Trial began on November 5, 1987 and three days later the jury returned a verdict of guilty as charged. At the conclusion of the sentencing phase of the trial, the jury returned a sentence of death in proper form by the following verdict:

We, the jury, unanimously find from the evidence beyond a reasonable doubt that the following facts existed at the time of the commission of the capital murder:

1. That the defendant actually killed Audie Kirkland Johnson;
2. That the defendant attempted to kill Audie Kirkland Johnson;
3. That the defendant intended that the killing of Audie Kirkland Johnson take place;
4. That the defendant contemplated that lethal force would be employed.

We, the jury, unanimously find that the aggravating circumstances of:

1. The capital murder of Audie Kirkland Johnson was committed when Robert Lee Shell was engaged in the commission of the crime of armed robbery;

2. The capital murder of Audie Kirkland Johnson was especially heinous, atrocious, or cruel;

Are sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating, and we unanimously find that the defendant should suffer death.

Tr. I. 65.

Shell then took his automatic appeal to the Mississippi Supreme Court raising thirteen (13) propositions. The case was briefed and orally argued before the court below. On November 29, 1989, the Mississippi Supreme Court, by a unanimous vote, affirmed the conviction and sentence of death in a written opinion. Shell v. State, 554 So.2d 887 (Miss.1989). A timely petition for rehearing was filed by petitioner with the court below and denied without opinion on December 20, 1989. From the opinion affirming the convictions and sentence of death petitioner brings this petition for certiorari.

B. FACTUAL HISTORY

This case began in the early morning hours of June 8, 1986, when Robert Lee Shell walked up to the home of Audie Kirkland Johnson with the intention of committing robbery and murder. Mrs. Johnson was a sixty-eight year old resident of Winston County whose husband had died approximately two weeks earlier. Because of this recent death, Mrs. Johnson had family members staying with her and on this early Sunday morning, her step-daughter Evelyn Lenaz was at the Johnson home.

Shell tried two doors to the house, but found them locked. He took a tire iron from a truck in the carport and, after an unsuccessful attempt to pry the kitchen door open, pried open the sliding glass door at the back of the house. Going down the hall, he found a light on in a bedroom and Mrs. Lenaz. He hit her in the head with the tire iron, and she fell to the floor. Shell continued down the hall to another bedroom where he turned the light on and found Mrs. Johnson. As Shell hit her over the head with the tire iron, she threw up her arms to protect herself, screamed and fell to the floor.

Hearing a door close down the hall, Shell ran back to the first bedroom, forced his way back into the room, and again hit Mrs. Lenaz over the head with the tire iron. As she fell, he hit her in the face. Shell returned to Mrs. Johnson's bedroom where he found that she had crawled to an adjoining bathroom. With Mrs. Johnson still on her knees, Shell beat her over the head with the tire iron until she fell to the bathroom floor. He then went back into the bedroom, found a pair of black gloves, and started "rambling".

Shell had removed some money from Mrs. Johnson's purse when he heard a noise from the bathroom. Returning to the bathroom, he took his knife and stabbed Mrs. Johnson two or three times. Shell then stood there, watching her breathe blood from her nose.

Shell returned to Ms. Lenaz's bedroom and took money from her purse. Ms. Lenaz was still alive. He then continued to "ramble" through the house, scattering papers and emptying

drawers, before eventually leaving through the sliding glass doors. Throwing the tire iron across the fence in the back yard, Shell began to walk home. He discarded the black gloves and the knife along the way. Reaching home he put his bloody shirt in the dirty clothes and went to bed.

At approximately 3 p.m. the following day, June 9, the pastor of the Johnsons' church received a call from Mrs. Lenaz who told him that she had been attacked. The Sheriff's Office was notified. Authorities found Mrs. Lenaz in a barely conscious state and Mrs. Johnson's body. Mrs. Lenaz survived the encounter, although with no memory of the events surrounding her attack. Mrs. Johnson had sustained massive head injuries, comminuted fractures, extensive bruises, cuts, subdural hemorrhaging, and heavy bleeding, which caused her death.

Based on an inconsistency between the stories told by Shell's father-in-law and Shell, the Sheriff of Winston County began questioning Shell. This resulted in his arrest and subsequent confessions to the murder and armed robbery. Shell later led authorities to some of the articles used in the crimes.

REASONS FOR DENYING THE WRIT

The question concerning the admissibility of photographs was not presented to the state court in federal constitutional terms. No interest concerning the federal constitution, a federal statute, or federal cases has been asserted by petitioner in the state-court proceedings. As the claim was not presented to the state courts at the time and manner required by law, this Court

has no jurisdiction to consider this question. Additionally, this issue differs considerably from the issue left unresolved by this Court in Thompson v. Oklahoma. Petitioner's portrayal of the photographs is inaccurate as is his claim that the photographs were not accompanied by explanatory testimony. Finally, the admissibility of photographs involves an evidentiary ruling by a state court which is not subject to review by this Court under its ruling in Lisenba v. California.

The jury was never instructed, either orally or in written form, that the finding of mitigating circumstances had to be unanimous. As the instructions did not prevent the jury or the individual jurors from considering and giving effect to the mitigating evidence presented, a Mills v. Maryland/McKoy v. North Carolina question is not raised.

As the lower court did not find either of the two aggravating circumstances invalid, Clemons v. Mississippi is inapplicable. There is no basis on which to remand this case for reconsideration in light of this Court's opinion in Clemons.

ARGUMENT

I. WHERE A QUESTION CONCERNING THE ADMISSIBILITY OF PHOTOGRAPHS, NOW FRAMED IN FEDERAL CONSTITUTIONAL TERMS, WAS NOT SO PRESENTED TO THE COURT BELOW, THIS COURT HAS NO JURISDICTION TO CONSIDER THE CLAIM.

It has long been held that the jurisdiction of this Court to re-examine the final judgment of a state court arises only upon a showing that the federal claim was adequately presented in the state court. Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889, 68

L.Ed.2d 392 (1981). After reviewing the relevant jurisdictional statute, 28 U.S.C.A. Section 1257(3), the Court's own rules, and the record of the case at hand, Webb held:

We cannot conclude on this record that petitioner raised the federal claim that she now presents to this Court at any point in the state-court proceedings. Thus, we confront in this case the same problem that arose in Cardinale v. Louisiana, 394 US 437, 438, 22 L Ed 2d 398, 89 S Ct 1161 (1969): "Although certiorari was granted to consider this question, . . . the sole federal question argued here has never been raised, preserved, or passed upon in the state courts below." Citing a long history of cases, we stated there that "[t]he court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions." Ibid. We have had several occasions to repeat this rule since then, Tacon v. Arizona, 410 US 351, 352, 35 L Ed 2d 346, 93 S Ct 998 (1973); Moore v. Illinois, 408 US 786, 799, 33 L Ed 2d 706, 92 S Ct 2562 (1972); Stanley v. Illinois, 405 US 645, 656, n 10, 31 L Ed 2d 551, 92 S Ct 1208 (1972); Hill v. California, 401 US 797, 28 L Ed 2d 484, 91 S Ct 1106 (1971); University of California Regents v. Bakke, 438 US 265, 283, 57 L Ed 2d 750, 98 S Ct 2733 (1978) (opinion of Powell, J.), and we see no reason to deviate from it now.

It is appropriate to emphasize again, see Cardinale v. Louisiana, supra, at 439, 22 L Ed 2d 398, 89 S Ct 1161, that there are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below.

451 U.S. at 498-99.

See: Buchanan v. Kentucky, 483 U.S. 402, n. 1 at 404, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987); Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969); Cardinale v. Louisiana, 394 U.S. 437, 438, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969).

The question concerning the admissibility of photographs was not presented to the state court in federal constitutional terms. While the heading for the relevant proposition on direct appeal alleged that Shell was deprived of "his rights under the constitution and the rules of evidence", at no point did petitioner specify federal constitutional provision or right was violated. Instead, argument was based on state case law, state statute, and the state rules of evidence. Indeed, federal law was referred to only for the proposition that because a sentence of death is different, there is a corresponding difference in the need for reliability in the sentencing process.¹

As can be seen from its opinion, it is clear that the Mississippi Supreme Court understood this question to concern solely the interpretation and application of case law. No where in its discussion did the lower court mention a federal issue or right or discuss the issue of the admissibility of photographs in

¹Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); accord Gardner v. Florida, 430 U.S. 349, 357-58, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Beck v. Alabama, 447 U.S. 625, 637-38, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980); Eddings v. Oklahoma, 455 U.S. 104, 118, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (O'Connor, J., concurring).

federal constitutional terms. No where did the lower court expressly pass upon a federal question concerning the admissibility of photographs.

Finally, the petition for rehearing before the Mississippi Supreme Court included no federal claim. In short, no interest concerning the federal constitution, a federal statute, or federal cases has been asserted by petitioner in the state-court proceedings.

As Webb found:

[T]here should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.

451 U.S. at 501 (emphasis in original).

This claim was not presented to the state courts at the time and manner required by law. Therefore, this Court has no jurisdiction to consider this question.

Respondent will also address in the alternative petitioner's argument that this issue is on point with the alleged constitutional violation which remained unresolved by this Court's opinion in Thompson v. Oklahoma, 487 U.S. ___, 108 S.Ct. ___, 101 L.Ed.2d 702 (1988). We disagree. This Court granted certiorari in Thompson to consider "whether photographic evidence that a state court deems erroneously admitted but harmless at the guilt phase, nevertheless violates a capital defendant's

constitutional rights by virtue of its being considered at the penalty phase. Id. at 709.

That is not the question here. In Thompson, the prosecutor introduced during the guilt phase three photographs of the victim's body which had been submerged in a river for almost four weeks. The Oklahoma Court of Criminal Appeals found that the use of two of these photographs was error, stating that the court failed to see "how they could possibly assist the jury in the determination of defendant's guilt." Id. at note 3. Although the photographs had been used during closing argument during the penalty phase, the Oklahoma court did not consider whether this was proper.

The question here is distinguishable on several points. The photographs were not admitted during the guilt phase as was the case in Thompson. They were not submitted to the jury to assist in the determination of guilt. Furthermore, there has been no ruling by the Mississippi Supreme Court that the photographs were introduced in error as occurred in Thompson. Just the opposite occurred. After reviewing evidentiary standards regarding the admissibility of photographs, the lower court found that the trial court followed the proper procedure in holding the photographs inadmissible during the guilt phase, but admissible during the sentencing phase on the specific issue of whether the crime was heinous, atrocious, or cruel. Shell v. State, 554 So.2d at 902. Thus, the unresolved question in Thompson does not correspond with the question presented here.

Furthermore, respondent feels compelled to correct two misconceptions presented by petitioner. Of the five photographs at issue, four reveal the appearance of Mrs. Johnson's body prior to the autopsy and depict the wounds as first seen by the medical examiner. Petitioner's argument here hinges on his portrayal of the fifth picture as one revealing the "mutilation" incidental to autopsy. This, quite simply, is inaccurate. The fifth photograph merely shows Mrs. Johnson's head with part of her hair shaved to reveal the nature of the wounds to her head. There has been no mutilation to the body by the medical examiner, only a preparatory procedure necessary to expose the mutilation caused by petitioner.

The second inaccuracy presented by petitioner is that there was no explanatory testimony for the photographs. In Footnote 2 to his petition, Shell states that there was not "sufficient" testimony to explain the photographs and that what little testimony there was was adduced at a hearing in limine before the trial court, but not the jury. Again, quite simply, this is inaccurate. It is also in direct contravention of the lower court's finding on this contention. All evidence and testimony from the guilt phase was re-introduced by the prosecution at the sentencing phase. Thus, the jury had before it the extensive testimony by staff from the state's Medical Examiner's office regarding the severity and scope of Mrs. Johnson's injuries². If

²The in limine argument concerning the admissibility of these pictures during the guilt phase is immaterial to the question of the use of the pictures during the sentencing phase.

this substantiation of the nature of these injuries is not satisfactory to the petitioner, then there is the additional explanation of the injuries found in Robert Shell's own written statement to the Sheriff's department. Finally, the lower court specifically held that there was sufficient explanatory evidence of the photographs. Shell, 554 So. 2d at 903.

The Thompson Court found it unnecessary to reach the photographic evidence question as the case was disposed of on the principal issue. 101 L.Ed.2d at note 48. However, the dissenting opinion by Justice Scalia sets out what we believe is the final proper reason for denying the writ on this question.

The photographs in question, showing gunshot wounds in the head and chest, and knife slashes in the throat, chest and abdomen, were certainly probative of the aggravating circumstance that the crime was "especially heinous, atrocious, or cruel. The only issue, therefore, is whether they were unduly inflammatory. We have never before held that the excessively inflammatory character of concededly relevant evidence can form the basis for a constitutional attack, and I would decline to do so in this case. If there is a point at which inflammatoriness so plainly exceeds evidentiary worth as to violate the federal Constitution, it has not been reached here. The balancing of relevance and prejudice is generally a state evidentiary issue, which we do not sit to review. Lisenba v California, 314 US 219, 227-228, 86 L Ed 166, 62 S Ct 280 (1941).

101 L.Ed.2d at 748 (emphasis added).

The admissibility of photographs is within the sound discretion of the state trial judge. The ruling thereon is an

The purpose of introduction went to two different matters during the respective phases.

evidentiary one not subject to review by this Court per its decision in Lisenba v. California, 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166 (1941). At issue in Lisenba were two snakes brought into the courtroom for identification. This Court held:

We do not sit to review state court action on questions of the propriety of the trial judge's action in the admission of evidence. We cannot hold, as petitioner urges, that the introduction and identification of the snakes so infused the trial with unfairness as to deny due process of law. The fact that evidence admitted as relevant by a court is shocking to the sensibilities of those in the courtroom cannot, for that reason alone, render its reception a violation of due process.

314 U.S. at 228-29.

The Mississippi standards concerning admissibility of photographs were reviewed by the lower court who found that the trial judge had not abused his discretion by admitting the pictures. This evidentiary ruling should not be subjected to review by this Court.

II. THERE IS NO BASIS ON WHICH TO REMAND THIS CASE FOR RECONSIDERATION IN LIGHT OF McKoy v. North Carolina.

The instructions given at the sentencing phase of this trial do not raise a Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), nor a McKoy v. North Carolina, 494 U.S. ___, 110 S.Ct. ___, 108 L.Ed.2d 369 (1990), question. Therefore, certiorari should not be granted on this claim.

At no time was the jury instructed, either orally or through written form, that the finding of mitigating circumstances had to be unanimous. After requiring the jury to make a unanimous

Enmund³ finding, the jury was required by Sentencing Instruction C-1 to "unanimously find, beyond a reasonable doubt, that one or more of the preceding aggravating circumstances exists in this case to return the death penalty." However, Instruction C-1 then dropped the requirement for unanimity by requiring the jury to "consider whether there are mitigating circumstances which outweigh the aggravating circumstances." The requirement for unanimity of Enmund findings and the finding of aggravating circumstances, but not the finding of mitigating circumstances, is carried over through the form of the verdict provided to the jury.

Because the instructions given made it clear that there did not have to be a unanimous finding of mitigating circumstances, neither Mills nor McKoy are applicable. In Mills, the petitioner's death sentence was vacated and the case remanded to the Maryland Court of Appeals because a majority of this Court concluded "that there is a substantial probability that reasonable jurors . . . may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." Id. at 384. At issue in Mills was a four part Findings and Sentence Determination Form which used the term unanimous in conjunction with the finding of mitigating circumstances. No such

³Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

requirement of unanimity, instruction, nor form of verdict at issue in Mills is at issue in the petition sub judice.

Similarly, North Carolina instructed the jury, both orally and in a written verdict form, to answer four questions in determining its sentence. One of the four questions asked: Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?" McKoy, 108 L.Ed.2d at 376. This Court found that under its decision in Mills, the "unanimity requirement violates the Constitution by preventing the sentencer from considering all mitigating evidence." Id. Again, nowhere in the instructions at issue here was the jury told that the finding of mitigating circumstances had to be unanimous.

Petitioner contends that the lower court did not "acknowledge" this Court's decision in Mills and that it relied on the defense attorney's closing argument to substantiate its holding. Neither contention is accurate. The lower court framed the question at issue and immediately held it to be without merit. In relying on Stringer v. Jackson, 862 F.2d 1108 (5th Cir.1988), the court "acknowledged" that the Fifth Circuit Court of Appeals had discussed this Court's holding in Mills and had addressed an argument based thereon in the context of a Mississippi death penalty case. The court concluded its discussion of the claim simply by noting that "in addition to the language found in the jury instructions," defense counsel addressed the need for individualized consideration of mitigating

evidence during his close. Shell, 554 So.2d at 905. Thus while the argument was noted by the lower court, the court did not base its holding on this point.

At no point did the instructions prevent the jury or the individual jurors from considering and giving effect to the mitigating evidence presented. Thus this question presents no basis on which to remand this case for further consideration.

III. THERE IS NO BASIS ON WHICH TO REMAND THIS CASE FOR RECONSIDERATION IN LIGHT OF CLEMONS V. MISSISSIPPI.

Petitioner asserts that the recent decision in Clemons v. Mississippi, 494 U.S. ___, 110 S.Ct. ___, 108 L.Ed.2d 275 (1990), provided guidance on the application of Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), to the Mississippi capital sentencing process and requires reconsideration by the lower court of its opinion in this case. We disagree.

Maynard v. Cartwright considered a claim of vagueness directed at the aggravating circumstances of "especially heinous, atrocious, or cruel". This Court found that this language, without additional definition, did not provide sufficient guidance for the jury's sentencing discretion. 486 U.S. at 363-64. The opinion concluded by determining that because the Oklahoma Court of Criminal Appeals had no provision for saving a death penalty when one of several aggravating circumstances was found invalid, this Court would not attempt to do what the Oklahoma state courts refused to do. 486 U.S. at 365.

Clemons v. Mississippi continued the discussion of a Maynard claim, but that claim was not the "especially heinous" aggravating circumstance. Instead, Clemons discussed the process by which the Mississippi courts could save a death sentence should an aggravating circumstance be found invalid. That the aggravating circumstance found invalid by the lower court was that of "especially heinous, atrocious, or cruel" is coincidental.

As the lower court did not find an aggravating circumstance to be invalid in the case sub judice, Clemons is not applicable. On direct appeal, petitioner attacked the "especially heinous" aggravating circumstance. The lower court began its discussion of the issue by pointing out that the jury had been given a limiting instruction further defining the terms of the aggravating circumstance. Shell, 554 So.2d at 905. The court then rejected petitioner's reliance on Maynard v. Cartwright because in Maynard there was no accompanying instruction defining the terms of the aggravating circumstance.⁴

The opinion continued by pointing out that neither the decision in Maynard, 486 U.S. at 365, nor Mississippi's most recent decision on the issue, Pinkney v. State, 538 So.2d 329

⁴The Mississippi Supreme Court clearly did not "explicitly" rely on Clemons v. State, 535 So.2d 1354 (Miss.1988), to reject petitioner's attack on the "especially heinous" aggravating circumstance. Instead, reliance was placed on the fact that a limiting instruction was given as required. Thus whether the Mississippi Supreme Court also places a limiting instruction on the "especially heinous" aggravating circumstance, as can be inferred by that court's reference to Clemons v. State, is irrelevant because the jury here was properly instructed.

(Miss.1988), mandated specific language which would satisfy the requirements of a limiting instruction. The lower court then found:

The instructions at issue in this case appear to adequately define each of the three potential aggravating factors in terms the average layman (juror) could understand. The language used is neither vague nor unclear.

554 So.2d at 906.

After rejecting petitioner's attack on this aggravating circumstance, the Mississippi Supreme Court further found that even if the attack had been successful and the circumstance found invalid, the remaining circumstance would be sufficient to uphold the death sentence. Id., citing to Clemons v. State, supra.

It is clear that the lower court did not find the "especially heinous" aggravating circumstance to be invalid in this case. Thus, Clemons v. Mississippi is inapplicable and there is no basis on which to remand this case for reconsideration in light of this Court's opinion in Clemons.

CONCLUSION

For the above and foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

MIKE MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI

CHARLENE R. PIERCE
SPECIAL ASSISTANT ATTORNEY GENERAL
(Counsel of Record)

BY: Charlene R. Pierce

Office Of The Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

CERTIFICATE

I, Charlene R. Pierce, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above Brief in Opposition to the following:

Kenneth J. Rose, Esquire
923 Carolina Avenue
Durham, N.C. 27705

This the 3rd day of July, 1990.

Charlene R. Pierce
CHARLENE R. PIERCE